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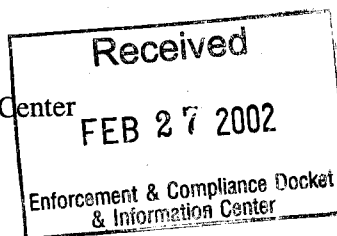
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February 27, 2002

United States Environmental Protection Agency  
Enforcement and Compliance Docket and Information Center  
Mail Code 2201A  
Attn: Docket #EC-2000-007  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460



SUBJECT: Selected States' Comments on Proposed EPA Cross-Media Electronic Reporting and Records Rule (CROMERRR); Docket #EC-2000-007

Dear Sir / Madam:

This letter contains comments that have been gathered from member States by the Environmental Council of States (ECOS), the national, non-partisan, non-profit association of state and territorial environmental commissioners. ECOS has acted to facilitate discussions among many states on the proposed electronic reporting requirements, has highlighted the results of these discussions as the comments presented in this letter, and urges careful consideration of the comments before moving ahead with implementation of the rule.<sup>1</sup> The comments included in this letter do **not** form an official ECOS policy position. While the 17 States listed in the footnote participated in developing this letter, it should not be assumed that they share each concern. Different States had different concerns and the purpose of this letter is to relay the totality of their concerns.

We appreciate the opportunity to comment on the United States Environmental Protection Agency's (EPA) proposed electronic reporting and records rule. Our members sincerely appreciate the efforts of EPA staff to identify issues and solutions relating to electronic record keeping and reporting. We also recognize that EPA has worked in coordination with States through the State Electronic Commerce / Electronic Data Interchange Steering Committee and through the National Governors' Association to define an appropriate performance-based approach for electronic reporting and record keeping requirements.

Many States have already made considerable progress with – and significant investments in – electronic reporting in order to improve the quality, efficiency and effectiveness of the flow of environmental information between the States and the regulated community. This is a very important issue to the States. State comments generally reflect a desire to promote electronic reporting of data in a more flexible manner than required by the rule as currently written, and one that will result in the collection of enforceable and legally defensible information. For this to be achieved, it is imperative that performance-based criteria be established instead of technology-based requirements, since technology is in an almost constant state of flux. Instead of promoting electronic reporting, the proposed rule would impose rigid legal and technical

<sup>1</sup> The following States participated in the preparation of this letter: Arizona, California, Delaware, Florida, Idaho, Indiana, Massachusetts, Maine, Minnesota, New Hampshire, New Jersey, Ohio, New York, Rhode Island, Texas, Virginia, West Virginia.

requirements that would likely discourage digital records and submittals. This concern is most pronounced for the record-keeping part of the proposed rule where EPA is imposing record keeping requirements for electronic data submittals that go beyond the counterpart requirements for the underlying information that would otherwise be used to prepare final paper reports. Comments illustrating the States' concern are provided below:

- ❖ The proposed rule contains overly prescriptive procedures that will impede or preclude the ability of many states to implement their existing or future electronic reporting systems. For example:
  - The electronic signature/certification scenario prescribes the exact process and the order to complete these steps. The prescriptiveness of this proposed language is counterproductive as written and it will preclude other approaches that would effectively accomplish this goal.
  - Many of the electronic information systems or recording devices that would be covered given the broad definition for electronic records in the proposed rule could not meet the audit trail requirements.
  - Business records are defined by a general standards approach under the Federal Rules of Evidence.
    - Under these rules, there is no prescriptive list of procedures for recording or maintaining the record.
    - Instead, the document can be admitted into evidence if it is “made at or near the time” of the transaction, “by a person with knowledge,” “in the course of a regularly conducted business activity” and in a trustworthy manner.

While these general standards can be met in a variety of ways, the federal courts have found them adequate for decades. In contrast, the proposed rule language may be so prescriptive that it unintentionally limits the ability of state agencies or prosecutors to admit otherwise admissible evidence showing environmental violations in administrative, civil, or criminal proceedings.

States recommend that EPA create general or performance-based standards that could be met in a variety of ways.

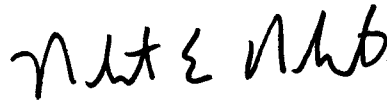
- ❖ The proposed requirements for acceptable electronic document receiving systems present a complex process for identifying the submitter and verifying their authority to originate the transmission. The complexity makes the process unnecessarily difficult to implement.
  - Most states have adopted the Uniform Electronic Transactions Act, which makes the submitter bound by their electronic signature. Accordingly, states may find that elaborate electronic signature agreements are unnecessary and may cloud an otherwise clear legal obligation.
  - States will be able to establish stronger requirements by tailoring their agreements to meet individual state needs and by focusing on fundamental obligations such as notifications to the state agency immediately upon discovery that an electronic signature has been compromised.
- ❖ Although purporting to be technologically neutral, several of the requirements appear to be based on one technology, Public Key Infrastructure (PKI). Specifically, EPA should in drafting the final rule:
  - Ensure the rule language is completely technology neutral since states may choose or already may have implemented technology that meets or exceeds the underlying performance goals of the rule.
  - Is consistent with the Government Paperwork Elimination Act's (GPEA) §1703(b)(1)(A), which states “the procedures and requirements of this rule shall be compatible with standards and technology for electronic signatures that are generally used in commerce and industry and by State governments.”
  - Review and consider the more general approach used in the Uniform Electronic Transactions Act.

- ❖ The archiving requirements, unfortunately, cannot be met as proposed since technologies for the long-term storage of documents containing digital certificates and a number of other requirements are not well established. In addition, implementing the requirements as written would be costly to States. For example, States would bear the cost of preserving legacy systems and records in their entirety until the record retention period ends would be considerable because of maintenance and administration skills retention. States recommend that EPA consult with:
  - National Archives and Records Administration and the Department of Defense Records Management Program to gain understanding of how other federal agencies have addressed the archiving of electronic records.
  - Other professional archivist organizations to gain understanding of how the private-sector is addressing archiving of electronic records.
- ❖ This proposed rule is not voluntary and could be quite costly to States that are implementing electronic reporting and record keeping.
  - Electronic record-keeping systems, as broadly defined in the proposed rule, already exist in states and regulated facilities. In such cases, the proposed rule would be applicable to those existing systems and records, regardless of whether there were any problems with their use.
  - Many states have existing systems that meet the underlying performance goals of the proposed rule. Under this proposal, these state systems would be required to undergo costly and unnecessary modifications.
- ❖ States currently assume the responsibility for proper record-keeping and reporting aspects of their authorized programs or delegation agreements, and that mechanism should serve the purpose for electronic reporting and record-keeping. States are also authorized to collect information from regulated entities. States request that EPA remove any language imposing a new review and approval process on those States who choose to use electronic reporting and record-keeping in lieu of paper documents.
- ❖ EPA can provide direction during oversight reviews or rescind the delegated program if a state is not adequately addressing the specified performance criteria.
- ❖ States are concerned that EPA appears to be the only federal agency using rule-making to implement GPEA. States recommend that EPA:
  - Determine how its requirements compare to efforts of groups such as the National Electronic Commerce Coordinating Council.
  - Consult with groups such as the National Association of Attorneys General, the National Council of State Chief Information Officers, and other relevant organizations to learn how other agencies are implementing GPEA.
- ❖ States, in some instances, found rule requirements and definitions were ambiguous. For example, some readers thought that the rule applied to laboratory equipment and some did not. EPA should review the rule to ensure that the applicability requirements as well as the definitions of "electronic document" and "electronic record" are re-written to remove the ambiguity.
- ❖ In summary, States recommend that EPA:
  - Work with state environmental and Attorney General representatives as co-regulators to proceed with the electronic reporting portions of the proposed regulation, to incorporate appropriate amendments based upon public comments,
  - Hold the record-keeping requirements in abeyance until the implications can be more fully examined.
    - Those portions of the proposed regulation should be reexamined in the context of all records, not just electronic records. They should also be reexamined for consistency with the policies and regulations of other federal agencies.
    - Gather additional information on States and the regulated industry electronic record-keeping practices and technologies

- Re-propose electronic record-keeping part of the rule when the above research and analysis is completed.

Thank you for the opportunity to submit our comments on these issues. We look forward to any opportunity to facilitate further discussions on these or other state comments on proposed rule language. If you have any questions, or need further clarification regarding any of the information in this letter, please contact John Coates at 850-488-4520 (email – [John.Coates@dep.state.fl.us](mailto:John.Coates@dep.state.fl.us)) or Mary Blakeslee at 202-624-3665 (email -- [maryb@sso.org](mailto:maryb@sso.org)).

Best regards,

A handwritten signature in black ink, appearing to read "R. E. Roberts".

Robert E. Roberts  
Executive Director